

## **Kansas Open Meetings Act (KOMA) Guidelines**

**Revision Date: July 1, 2015**

### **I. PURPOSE AND CONSTRUCTION**

#### **A. Public Policy.**

1. It is the public policy of Kansas that meetings be open to the public because “a representative government is dependent upon an informed electorate. . . .” K.S.A. 2014 Supp. 75-4317.

#### **B. KOMA is interpreted liberally and exceptions narrowly construed to carry out the public purpose of the law. *Murray v. Palmgren*, 231 Kan. 524, Syl. ¶ 4 (1982) (KOMA enacted for the public benefit and therefore is construed broadly in favor of the public to give effect to its specific purpose).**

### **II. BODIES SUBJECT TO KOMA**

#### **A. Two concurrent requirements found K.S.A. 2014 Supp. 75-4318:**

1. All legislative and administrative bodies, and agencies of the state, and political and taxing subdivisions thereof
2. Which receive or expend and are supported in whole or in part by public funds.

#### **B. Specific Bodies Subject to KOMA:**

1. Political and taxing subdivisions include:
  - a. Cities, counties, townships. AGO 81-288.
  - b. School districts, community colleges. AGO 81-258.
  - c. Watershed districts. AGO 85-161.
  - d. Rural water districts. AGO 89-92; 88-97.
  - e. Drainage districts. AGO 90-69.
  - f. Local historic preservation committees administering K.S.A. 75-2724. AGO 99-22.
2. State agencies and boards, unless otherwise provided. AGO 86-176.

C. Subordinate Groups Subject to KOMA.

1. All subordinate groups, such as boards, commissions, authorities, councils, committees, subcommittees are covered by act if:
  - a. The parent or controlling body meets funding test (*State ex rel., Murray v. Palmgren*, 231 Kan. 524 (1982), and
  - b. Appointed by parent body to weigh options, discuss options, present recommendations or a plan of action.
  - c. It is the nature of the group, not its designation, which determines if it is subject to KOMA. AGO 86-92; *see also* AGOs 86-38; 80-201; 77-53; 76-140; 76-122; 73-235.
  - d. Examples of subordinate groups:
    - 1) School District Advisory Board. AGO 84-81.
    - 2) Fire District Advisory Board. AGO 86-84.
    - 3) Mayor's Commission. AGO 88-25.
    - 4) Appointed grievance committees created by a city to hear employee grievances. AGO 91-31.
    - 5) SRS Drug Utilization Review Board. AGO 93-41.
    - 6) Parental boards under Recreation Commission. AGO 93-73.
    - 7) House and senate conference committees. AGO 93-113.
2. Joint boards subject to KOMA if boards composed of members of different governmental bodies and:
  - a. Appointed by official action, AGO 86-48; or
  - b. Majority of a public body is present. *See also* AGO 84-103 (discussing joint boards under prior law) and 91-150 (discussing presence of public body on joint board under prior law).

D. Non-profit corporations may be subject to KOMA if the non-profit:

1. Receives or expends public funds;

2. Is subject to control of governmental unit(s); and
3. Acts as a governmental agency in providing services or has independent authority to make governmental decisions.
4. Examples of nonprofit corporations subject to KOMA:
  - a. Area agencies on aging. AGO 79-219.
  - b. Economic Opportunity Foundation, Inc. AGO 84-10.
  - c. McPherson Co. Diversified Services, Inc. AGO 79-284.
  - d. Three Rivers, Inc. AGO 87-143.
  - e. Cowley County Diversified Services. AGO 87-188.
  - f. HELP, Inc. AGO 88-27.
  - g. Southwest Developmental Services, Inc. AGO 94-111.
5. Examples of nonprofit corporations not subject to KOMA:
  - a. Private nursing homes. AGO 79-221.
  - b. KU and WSU Endowment Associations. AGO 82-172; 80-239.
  - c. Planned Parenthood. AGO 81-253.
  - d. Hutchinson Cosmosphere. AGO 82-256.
  - e. Electric Cooperatives. AGO 85-175; *see also Memorial Hospital v. Knutson*, 239 Kan. 663 (1986) (nonprofit operating a county hospital not subject to KOMA; association leased hospital for \$1.00 per year and received \$228,000 from the county mill levy budgeted by county hospital board of trustees, about 4.8% of total revenues; court held this was a limited receipt of public funds)
  - f. Parsons Chamber of Commerce. AGO 89-149.
  - g. K-10 Corridor Development, Inc. AGO 94-42.
  - h. Koch Commission. AGO 94-55.
  - i. Kansas Venture Capital, Inc. AGO 94-107.

- j. Mid-America Commercialization, Inc. AGO 94-99.
- k. Consensus Estimating Group – with staff from state agencies. AGO 94-93.
- l. Prairie Village Economic Development Commission. AGO 99-64.
- m. Hesston Area Senior Center. AGO 2001-02.
- n. Sheltered Living, Inc. AGO 2004-34.
- o. KSU Student Senate. AGO 77-174.

E. Bodies and meetings not subject to KOMA:

- 1. Governor-elect transition office (GETO) and Budget Efficiency Savings Team (BEST). *Associated Press v. Sebelius*, 31 K.A.2d 1107 (2003) (entities not subject to KOMA; not created by statute and no authority to act).
- 2. Staff meetings.
- 3. Judicial agencies and bodies. AGO 82-254 (concerning Supreme Court nominating commission).
- 4. Bodies exercising quasi-judicial functions – K.S.A. 2014 Supp. 75-4318(g)(1).
  - a. Examples:
    - 1) Zoning boards. AGO 78-13.
    - 2) City grievance panels. AGO 91-31.
    - 3) Hearing panels. AGO 97-40.
  - b. Only quasi-judicial deliberations may be closed—binding action must be in open meeting. AGOs 91-31; 84-50; 79-225.
  - c. KAPA hearings (K.S.A. 77-501 *et seq.*) are not deemed meetings as defined in KOMA. *See* K.S.A. 2014 Supp. 77-523(f); *see also* K.S.A. 2014 Supp. 75-4318(g); AGO 2014-07 (KAPA only applies to the extent a board's statutes expressly provide that proceedings under those statutes are governed by KAPA; if KAPA does not apply, then actions of an investigations committee of a state licensing board must be held in accordance with KOMA).
- 5. Private Organizations.

a. Examples:

- 1) Private/parochial schools. AGO 81-94.
  - 2) Nursing homes. AGO 79-221.
6. Precinct committees. AGO 94-157.
  7. Meetings of legislature, if house or senate rules so provide. K.S.A. 2014 Supp. 75-4318(a).
  8. Hospital board discussions regarding risk management and peer review exempted from open meeting discussion. AGO 89-42.

### III. MEETING

KOMA only applies when a body subject to the act holds a meeting as defined by law.

A. “Meeting” defined by K.S.A. 2014 Supp. 75-4317a:

1. Any gathering or assembly, in person or through the use of a telephone or any other medium for interactive communication,
2. By a majority of the membership of an agency or body,
3. For the purpose of discussing the business or affairs of the body or agency.

B. Gathering or Assembly, in Person or Through the Use of a Telephone or other Medium for Interactive Communication.

1. May conduct meetings by telephone or other medium for interactive communication (video, third parties, Skype, etc.) if do so in compliance with all KOMA requirements, *e.g.*, notice, free access, etc. AGOs 2011-23; 2005-03; 81-268; 80-173; 80-159.
2. Informal discussions before, after, or during recesses of a public meeting are subject to KOMA. *Coggins v. Public Employee Relations Board*, 2 K.A.2d 416, 423, *rev. denied* 225 Kan. 843 (1978).
3. Title of the gathering, *e.g.* work session, is irrelevant if the three requirements of a meeting are met. AGO 90-47; 80-197.
4. “Serial communications” or interactive communications outside of a noticed meeting. K.S.A. 2014 Supp. 75-4318(f).

- a. Interactive communications in a series or “serial communications” may constitute a meeting subject to KOMA if they:
    - 1) Collectively involve a majority of the membership of the body or agency,
    - 2) Share a common topic of discussion concerning the business or affairs of the body or agency, and
    - 3) Are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the body or agency.
  - b. Whether a series of communications constitutes a violation is very fact specific. AGO 2009-22 (no interactive communication where nonmember communicates with a majority of body or agency board and member responds as well as shares response with other members; possibility exists for KOMA violation if there is further interactive communication).
- C. Majority of the Membership of the Body.
1. “A majority” means the next whole number greater than one-half the total number of members. AGOs 2002-41; 93-140; 87-152; 87-132; 87-45; 86-110; and 83-174.
- D. For the Purpose of Discussing the Business or Affairs of the Body.
1. Binding action or voting is not necessary; discussion is what triggers KOMA. AGO 79-200 (setting out general “common sense guidelines” under prior law).
  2. “Meeting” includes all gatherings at all stages of the decision making process. *Coggins v. Public Employees Relations Board*, 2 K.A.2d 416, 423, *rev. denied* 225 Kan. 843 (1978).
  3. Social gatherings are not necessarily subject to KOMA; if there is no discussion of the business of the body, one element of a meeting is absent.
  4. Retreats and meetings held in private clubs are probably prohibited, especially if site makes it impossible for public to attend without cost. AGOs 82-133 (discussing meeting proposed to be held in Colorado); 80-148.
  5. Members attending an educational conference/seminar where items of general interest are discussed (such as a convention of League of Municipalities) are not in violation of the KOMA, as long as the specific

business of a body is not discussed. AGO 82-133.

- a. Opinion focused on the fact that seminars sponsored by the League are open to attendance by the press and public, and are held within Kansas state borders, “thus enhancing its accessibility to the citizens of various Kansas municipalities whose officials are in attendance.”
  - b. CAVEAT: a majority of a public body using such gatherings to discuss the business and affairs of the body among themselves “subverts the purposes of the [KOMA] and must be regarded as a violation. . . .” AGO 82-133.
  - c. When traveling to, attending or returning from such gatherings, advise the members of public bodies to avoid discussing the business or affairs of the body amongst themselves. AGO 82-133.
6. Marriage between two members of a five member city council of a third class city does not violate KOMA, but they should not discuss city business outside open meeting. *See* AGO 87-45 (discussing definition of meeting under prior law which required a majority of a quorum).

#### **IV. NOTICE OF MEETINGS**

Contrary to popular belief, KOMA does not actually require notice of meetings to be published in advance of the meeting in a paper, on the Internet, etc.

- A. Must request notice of meetings before the public body is required to provide it. K.S.A. 2014 Supp. 75-4318(b). Notice shall be furnished to any person or organization requesting it. AGO 86-133.
  1. Residence of the requester is irrelevant. AGO 81-137.
  2. Notice request expires at the end of the fiscal year; request must be renewed.
    - a. Must first notify of expiration before terminating notice. K.S.A. 2014 Supp. 75-4318(b)(3).
  3. Presiding officer has duty to provide notice, but that duty may be delegated. K.S.A. 2014 Supp. 75-4318(c).
- B. Form of Request and Notice.
  1. Oral request is valid; prosecution is difficult if request for notice is not honored. AGOs 86-133; 81-22; 81-15.
  2. Notice given can be written or oral, but must be made individually to the

person requesting it. Posting or publication in newspaper is insufficient.

3. A single notice can suffice for regularly scheduled meetings; must notify the requester of any special meetings. AGO 83-173.
4. Cannot charge a fee for providing notice. AGOs 82-141; 81-137.
5. If notice requested by petition, petition shall designate one person to receive notice on behalf of all persons named in petition; notice to designee constitutes notice to all persons named in petition. K.S.A. 2014 Supp. 75-4318(b)(1); AGO 86-133.
6. No time limit is imposed for receipt of notice prior to meeting. Notice must be given in a “reasonable time.” Reasonableness depends on the circumstances. AGO 81-15.
7. To establish a violation for failure to provide notice of a meeting there must have been a prior request for notice. A pattern of providing courtesy notice does not create a duty to provide it.
8. Content of notice – must provide the date, time and location of the meeting. K.S.A. 2014 Supp. 75-4318(b).

C. Agendas.

1. KOMA does not require that an agenda be created.
  - a. If a body chooses to create an agenda, the agenda must include topics planned for discussion if known at the time the agenda is prepared. *Stevens v. City of Hutchinson*, 11 K.A.2d 290, 293 (1986).
  - b. Agenda may be amended during a meeting unless there is a statute or rule prohibiting amendment. *USD 407 v. Fiske*, 232 Kan. 820 (1983).
2. If agenda exists, it shall be made available to any person requesting it prior to the meeting. K.S.A. 2014 Supp. 75-4318(d); AGO 78-281.
  - a. Agenda not required to be mailed out; can simply be provided by placing the agendas in a public place. AGOs 86-133; 81-15; 79-218.
3. Mandamus proper remedy for board of county commissioners’ alleged KOMA violations for failing to include planned discussion topic on agenda for meeting. *Klein v. Johnson County Bd. of County Comm’rs*, 77 P.3d 1009, Syl. ¶ 1 (Court of Appeals, 2003) (unpublished opinion).

D. Minutes.



1. KOMA does not require minutes except to record motions for executive sessions. AGO 90-47.
  - a. CAVEAT: Local bylaws, ordinances, or policies may require meeting minutes be kept.
2. Not required to disclose publicly draft of minutes before vote to approve such minutes unless draft publicly cited or identified in an open meeting or in the agenda of an open meeting; once cited or identified, draft minutes open. AGO 2013-5.

## **V. CONDUCT OF OPEN MEETINGS**

- A. All meetings by public bodies subject to KOMA are required to be open. K.S.A. 2014 Supp. 75-4318(a).
- B. Public attendance and observation only.
  1. Any person may attend open meetings. AGO 80-43.
  2. KOMA does not require that the public be allowed to speak or to have an item placed on the agenda; “right” is to attend and listen. AGO 2005-03.
    - a. Check local ordinances and policies; these may provide for a public comment portion of the meeting.
    - b. K.S.A. 2014 Supp. 21-6203(a)(2), Disorderly conduct, prohibits “disturbing an assembly, meeting or procession, not unlawful in its character”; violation is a class C misdemeanor.
- C. Recording meetings.
  - a. Use of cameras, photographic lights and recording devices not prohibited in open meeting. K.S.A. 2014 Supp. 75-4318(e).
    1. Use subject to reasonable rules designed to insure the orderly conduct of the meeting.
- D. Action.
  1. Binding action by public body must be conducted in the open; secret ballots not allowed. K.S.A. 2014 Supp. 75-4318(a).
    - a. The public must be able to ascertain how each member voted. AGOs 93-55; 86-176; 81-106; 79-167.

E. Meeting location.

1. KOMA does not dictate the location of the meeting, the size of the room, or other accommodation type considerations. Key to openness is whether location is accessible to the public. AGOs 2011-23; 86-153; 82-133; 80-148; 79-253.

## VI. EXECUTIVE SESSIONS

A. Generally.

1. Public body must convene an open meeting before it can recess into executive session. K.S.A. 2014 Supp. 75-4319(a); AGO 81-22.
2. “No binding action shall be taken in closed or executive recesses, and such recesses shall not be used as a subterfuge to defeat the purposes of this act. K.S.A. 2014 Supp. 75-4319(c); AGO 91-31.
  - a. May reach a consensus in executive session. *O’Hair v. USD No. 300*, 15 K.A.2d 52, Syl. ¶ 10 (1991).
  - b. A “consensus” may constitute binding action and violate KOMA if a body fails to follow up with a formal open vote on a decision that would normally require a vote. *City of Topeka v. Watertown Place Development Group*, 265 Kan. 148 (1998).
3. Decision to hold executive session is discretionary.
  - a. KOMA never requires an executive session. *See* K.S.A. 2014 Supp. 75-4319(a) (bodies and agencies subject to the act “may recess”).
  - b. Other laws or policies concerning privacy or confidentiality need to be considered when deciding on the need for executive session.

B. Recessing into executive session.

1. Procedure – K.S.A. 2014 Supp. 75-4319(a) requires specific steps to be taken to recess into an executive session.
  - a. Must be a formal motion, seconded, carried, and recorded in the minutes.
  - b. Three statutory elements to proper motion:
    - 1) Justification for closure,

- 2) Subject(s) to be discussed, and
  - 3) Time and place the open meeting will resume.
2. The justification and the subject are not the same thing. AGOs 91-78; 86-33; *but see State v. USD 305*, 13 K.A.2d 117 (1988) (privacy rights of non-elected personnel sufficient justification for executive session under KOMA)
    - a. The justification is an explanation of what is to be discussed (without revealing confidential information.)
    - b. The subject is one of the topics allowed for executive session listed in K.S.A. 2014 Supp. 75-4319(b)(1) through (16).
  3. Sample Motion:
 

“Madam Chairman, I move we recess into executive session to discuss disciplinary action against a student in order to protect the privacy of the parties involved. We will reconvene the open meeting in the conference room at 8:30 p.m.”
  4. Executive session motions must be recorded in minutes. K.S.A. 2014 Supp. 75-4319(a).
    - a. KOMA does not require other information discussed during the executive session to be recorded. Other minutes for open or executive sessions are discretionary, unless some other law requires them. AGO 90-47.
    - b. Minutes must be maintained as a part of the permanent records of the agency or body. K.S.A. 2014 Supp. 75-4319(a).
  5. Motion to go into executive session assures the public that the executive session is permissible and in the public interest; may also remind the members of the public body of the limitations upon and purpose served by the executive session discussion. AGO 91-78.
- C. Examples of subjects that may be discussed in an executive session:
1. Personnel matters of non-elected personnel. K.S.A. 2014 Supp. 75-4319(b)(1).
    - a. Must be to discuss an individual, not groups. AGO 88-25; 81-39; 80-102; *but see State of Kansas v. USD 305 et al.*, 13 K.A.2d 117 (1988) (discussion of exempt and nonexempt topics in executive session;

separation burdensome and impractical, if not impossible).

- b. Must be to discuss personnel, not policy matters. AGO 2009-21 (employee evaluation may take place in executive session; employee's implementation of policy or directive may be discussed, but not policy or directive itself).
  - c. Purpose of exception is to protect the privacy interests of employees, save personal reputations, and encourage qualified people to remain in government employ. *State of Kansas v. USD 305*, 13 K.A.2d at 119.
  - d. Discussions of consolidation of departments or overall salary structure are not proper topics for discussion under this exception.
  - e. "Personnel" refers to employees of the public agency. AGO 87-10.
    - 1) "Personnel" does not include appointments to boards or committees. AGO 87-10.
    - 2) "Personnel" does not include independent contractors. AGO 2002-28; 87-169.
    - 3) KOMA does not give employee a right to be present in the executive session or to force an open session. Other laws or contracts may, however.
    - 4) Exception may be used to discuss applicants for employment. AGO 96-61.
2. Consultation with the body's attorney that would be deemed privileged in the attorney-client relationship. K.S.A. 2014 Supp. 75-4319(b)(2); *see also* K.S.A. 60-426 (Lawyer-client privilege); *Pickering v. Hollabaugh*, 194 Kan. 804 (1965).
- a. All elements of attorney-client privilege must be present:
    - 1) The body's attorney must be present,
    - 2) The communication must be privileged, and
    - 3) No other third parties may be present. AGO 92-56; 82-247; 82-176; 82-130; 78-303.
  - b. Cannot be used to discuss letter received from attorney if the attorney is not present. AGO 86-162.
  - c. Closed executive session statements of city commission not subject

to attorney/client privilege; held discoverable. *Hinsdale v. City of Liberal*, 981 F.Supp. 1378, 1378 (1997).

3. Employer-employee negotiations. K.S.A. 2014 Supp. 75-4319(b)(3).
  - a. May meet in executive session to discuss conduct or status of negotiations, with or without the authorized representative who is actually doing the bargaining. AGO 79-125.
  - b. Cannot use this exception to meet with employees. AGO 80-43.
  - c. School boards have special rules for professional negotiations. *See* K.S.A. 72-5423(b); AGO 92-51.
4. Confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorship. K.S.A. 2014 Supp. 75-4319(b)(4).
  - a. Economic development groups. AGO 88-148.
  - b. Must be for data that is truly confidential in nature. *See* K.S.A. 60-3320; *Southwestern Bell Telephone Co. v. KCC*, 6 K.A.2d 444, 457 (1980), *rev. den.* 230 Kan. 819 (1981); *All West Pet Supply v. Hill's Pet Products*, 840 F.Supp. 1433, 1437 (Kan. 1993).
  - c. Kansas Bioscience Authority has special rules on executive sessions to discuss or consider marketing or operational strategies; may also use any other exception found in K.S.A. 2014 Supp. 75-4317 *et seq.* *See* K.S.A. 2014 Supp. 74-99b07(c); AGO 2011-23.
5. Matters affecting a student, patient, or resident of public institutions. K.S.A. 2014 Supp. 75-4319(b)(5).
  - a. Must concern a particular person, not students, patients or residents in general.
    - 1) General discussion of quality of care and staffing at county hospital no allowed in executive session. AGO 2008-22; *see also* AGO 89-22 (discussing hospital peer review and risk management reports).
  - b. Hearing must be open if requested by person involved.
  - c. Inmates are residents of institutions. AGO 80-102.
6. Preliminary discussions relating to acquisition of real property. K.S.A. 2014

Supp. 75-4319(b)(6).

- a. Acquisition only, not sale of property, which must be discussed in open meeting. AGO 87-91.
- b. This exception can be used only when the primary focus of the discussion is real property; negotiating strategy alone is insufficient. AGO 89-92.

7. Security measures, if open discussion would jeopardize security. K.S.A. 2014 Supp. 75-4319(b)(13).

- a. Any confidential records concerning security discussed in executive session are exempt from subpoena, discovery or other action. K.S.A. 2014 Supp. 45-221(g).

8. Other subjects may be discussed in closed or executive meeting pursuant to specific statutes. *See, e.g.*, K.S.A. 2014 Supp. 75-4319(b)(7) [racing and gaming]; (b)(8) [abuse and neglect]; (b)(9) [child death review board]; (b)(11) [Medicaid drug utilization board] (b)(12) [tribal-state gaming compacts]; (b)(14) (records on matters related to child care facilities or maternity centers); (b)(15) [KHPA and inspector general discussion of investigations and audits).

D. Attendance to executive session—who can be present?

1. Only the members of a public body have the right to attend executive session. AGO 87-170 (county clerk does not have right to attend); 86-143 (members of advisory boards do not have right to attend).

- a. Mere observers may not attend. Inclusion of general observers means the meeting should be open to all members of the public. AGO 92-56; 86-143; 82-176.

- b. Persons who aid the public body in their discussions may be admitted to the executive session. AGO 91-31; 82-176; 80-43.

2. CAVEAT: Non-clients cannot attend executive sessions for attorney-client privileged communication. AGO 82-247.

## VII. ENFORCEMENT

- A. Any member of a body or agency who “knowingly” violates KOMA provisions or who intentionally fails to provide information required by K.S.A. 2014 Supp. 75-4318(b) (notice), shall be liable for payment of a civil penalty in a sum not to exceed \$500 for each violation. *See* K.S.A. 2014 Supp. 75-4320(a).

1. No requirement of specific intent to violate the law. “Knowing” violation occurs when there is purposeful commission of the prohibited acts. (*Palmgren*, 231 Kan. 524, Syl. § 10 and at 536-37).

B. Procedure.

1. Attorney general and county/district attorney have concurrent jurisdiction to investigate or bring an action. K.S.A. 2014 Supp. 75-4320.
  - a. Venue in county where meeting held. K.S.A. 2014 Supp. 75-4320a(a).
2. Attorney general and county/district attorney may issue investigative subpoenas, take testimony under oath, examine documents and require attendance during such examination, and serve interrogatories. K.S.A. 2014 Supp. 75-4320b.
3. Injunction, mandamus, or declaratory judgment can be brought by any person or by attorney general or county/district. K.S.A. 75-4320a(a); *Stoldt v. City of Toronto*, 234 Kan. 957, ¶ 1 (1984).
  - a. Injunctive relief, rather than mandamus, proper remedy to address board of county commissioners’ past KOMA violations. K.S.A. 60-8016; *Klein v. Johnson County Bd. Of County Comm’rs*, 77 P.3d 1009 (Court of Appeals, 2003) (unpublished case).
4. Public body bears the burden of proof to sustain its action. K.S.A. 75-4320a(b).
5. Except as otherwise provided by law, KOMA enforcement proceedings have precedence over all other cases and “shall be assigned for hearing and trial at the earliest practicable date.” K.S.A. 75-4320a(e).

C. Penalties for violation.

1. Penalties are civil, not criminal, in nature. K.S.A. 2014 Supp. 75-4320.
2. Penalties are assessed against the individual, not the public body. K.S.A. 2014 Supp. 75-4320(a).
  - a. Penalty of up to \$500 for each violation as determined by the district court in actions brought by attorney general or county/district attorney.
  - b. Civil penalties recovered by attorney general paid to state general

fund; civil penalties recovered by county/district attorney paid to general fund in county where proceedings instigated. K.S.A. 75-4320(b).

3. Voiding action. K.S.A. 75-4320(a).
  - a. Binding action taken at a meeting not in substantial compliance with KOMA may be voided by court.
  - b. Action to void must be filed within 21 days of the meeting where the alleged violation took place.
  - c. Only attorney general and county/district attorney have standing to seek avoidance of governmental action based on violations of KOMA; may also bring action to seek injunctive or mandamus relief. K.S.A. 2014 Supp. 75-4320; *Stoldt*, 234 Kan. 957, ¶ 1; *Krider v. Board of Trustees of Coffeyville Community College, Montgomery County*, 277 Kan. 244 (2004); *see also Mid-Continent Specialists, Inc. v. Capital Homes, L.C.*, 279 Kan. 178 (2005).
4. Technical violations.
  - a. Courts overlook technical violations if public body made good faith effort to comply, there was substantial compliance with KOMA, no one prejudiced, and public's right to know not effectively denied. *Stevens v. Board of Reno County Comm'rs*, 10 K.A.2d 523, 526 (1985); *see also* K.S.A. 2014 Supp. 75-4320a(a) (action taken at a meeting not in substantial compliance shall be voidable).

D. Other Consequences.

1. Ouster pursuant to K.S.A. 60-1205; *see also* AGO 80-168. This is a separate action which must be filed by a public prosecutor.
2. Recall pursuant to K.S.A. 25-4301 *et seq.*; *but see* K.S.A. 25-4302 concerning grounds for recall (felony, misconduct in office or failure to perform duties prescribed by law; "misconduct in office" defined as violation of the law that impacts the officer's ability to perform the official duties of the office); *see also Collins v. Hoeme*, 40 K.A.2d 93, 96 (2008) (KOMA violations sufficient for recall of elected officials).
3. Ouster or recall not automatic – these actions must be pursued separately.

E. Costs.

1. Court may award costs to person seeking to enforce K.S.A. 2014 Supp. 75-



4318 or 75-4319. Unlike civil penalty, costs are assessed against the public body or agency responsible for violation. K.S.A. 2014 Supp. 75-4320a(c).

2. Where defendant is the prevailing party, court may award costs if it finds plaintiff maintained action was frivolously, not in good faith or without a reasonable basis in law. K.S.A. 2014 Supp. 75-4320a(d).

## **VIII. 2015 LEGISLATIVE CHANGES**

- A. HB 2256 – enrolled May 22, 2015, and effective July 1, 2015.
  1. Predominantly a process bill.
- B. Creates graduated enforcement options to encourage resolution of KOMA violations in lieu of filing an enforcement action.
  1. Consent judgment – can be utilized by attorney general, county or district attorney. New Section 5.
  2. Consent order and finding of violation – utilized by attorney general. New Section 4.
    - a. Establishes preponderance of the evidence standard. New Section 4.
  4. Establishes a mechanism to enforce out-of-court settlements and findings of violation through judicial review. New Section 4.
    - a. Venue in the county where consent order or finding of violation is issued or is effective. New Section 4.
- C. Training.
  1. Expressly authorizes either the courts or the attorney general to require that persons who violate either KORA or KOMA undergo training and provide proof they have satisfied this requirement. New Section 4.
  2. Subject to availability of appropriations, the attorney general may provide and coordinate training throughout the state to promote knowledge of and compliance with KORA and KOMA. New Section 8.
  3. Authorizes attorney general to review and approve training programs to permit uniformity in training; qualified training programs can obtain a “stamp of approval.” New Section 8.
  4. Authorizes attorney general to establish a system of online training to help make training widely available. New Section 8.

D. Investigations.

1. Establishes mechanism to enforce investigative demands, such as subpoenas. Section 19.
2. Confidentiality – makes clear that any assertion of confidentiality by the alleged violator must be respected by the prosecutor, who may not release the records received during the course of an investigation without a court order. Section 13.

E. Complaint form.

1. Requires requests for investigation submitted to the attorney general be submitted under penalty of perjury on a form approved by the attorney general. New Section 6.

F. Investigation costs and fees.

1. Permits the state to recover reasonable investigation costs and attorney fees. New Section 4.
2. Costs, fees, expenses and penalties recovered by the attorney general deposited in newly created open government fund to support purposes of KOMA and KORA, including training and enforcement actions. New Section 7.